No. 02-1182

Supreme Court, U.S.
FILED
MAR 14 2003
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In The

# Supreme Court of the United States

DONALD OATMAN,

*Petitioner,*

v.

FUJI PHOTO FILM USA, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether an employee can sustain a claim for termination in violation of the Family and Medical Leave Act ("FMLA") when the employee was permitted to take FMLA leave for 188 days and admits that he could not perform the essential functions of his position with or without reasonable accommodation at the time of his termination – and, indeed, did not believe that he would ever be able to hold another job through retirement age?

2. Whether an employee can sustain a claim under § 510 of the Employee Retirement Income Security Act ("ERISA") when the employee admits that he was not qualified for the position from which he was terminated because he could not perform the essential functions of his job with or without reasonable accommodation at the time of his termination (or until the age of 65) and when there is no evidence that the employer acted with the intent to interfere with any ERISA benefits?

## PARTIES TO THE PROCEEDINGS AND DISCLOSURE PURSUANT TO RULE 29.6

In addition to the parties to the proceeding listed in the Petition for Writ of Certiorari, Fuji adds the following: Jennifer Burr Altabef, Carrington, Coleman, Sloman & Blumenthal, L.L.P., Counsel of Record for Respondent.

Pursuant to Rule 29.6, Fuji identifies the following parent corporations: Fuji Film America Co., Inc. and Fuji Photo Film Co., Ltd. There is no publicly held company owning 10% or more of Fuji's stock.

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## APPLICABLE STATUTES AND REGULATIONS

In addition to the statutes and regulations cited at pages 1-5 of the Petition, Fuji Photo Film USA, Inc. ("Fuji") directs the Court to the following regulation which may be relevant to its consideration of the Petition for a Writ of Certiorari ("Petition"):

> Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that is known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation. Appendix to 29 C.F.R. § 1630; excerpt from § 1630.9 (1992).

## STATEMENT OF THE CASE

Petitioner Donald Oatman's ("Petitioner") statement of the case omits or obscures several critical and indisputable facts. Indeed, this case concerns an employee who was permitted to take nearly 27 weeks of FMLA leave – more than twice the amount required by the FMLA – before he was terminated. As discussed below, the termination came

only after Fuji was made aware of information suggesting that he was not using his extended FMLA leave for its intended purpose, and after Petitioner failed to provide information (despite repeated requests) to establish that continued leave was necessary. Fuji clarifies Petitioner's statement of facts as follows:

Petitioner's suggestion that Regional Human Resources Manager Al Levine ("Levine") insisted that Petitioner return to work in 1994 and promised to modify his position is without basis. Petition, p. 6. Petitioner testified that he elected to return to work after three weeks, and that Fuji did not require him to do so. (1 R 110:1-10; 116:14-21) Petitioner also testified that he did not request any accommodation (other than leave for surgery) to address his problems with his knee between 1994 and 1998. (1 R 120:13-21)

Although Plaintiff was scheduled to commence his FMLA leave for his second knee surgery on April 6, 1998, he requested and was permitted to leave one week earlier due to pain in his knee. (1 R 159:13-21; 1 R 154:25-155:14; 3 R 523, ¶5) Levine approved the early departure, advising Plaintiff to "take care." (*Id.*)

On July 24, 1998, when Levine sent Petitioner a letter informing Petitioner that he had been granted FMLA leave beginning July 20, 1998, and running through October 9, 1998, Petitioner had already been on FMLA leave for one hundred and fifteen (115) days. (1 R 215:2-10; 2 R 332-334)

Petitioner's reliance on his interpretation of the contents of the videotape is purely speculative. Indeed, Petitioner neglects to advise the Court of the response of Plaintiff's treating physician, Dr. James B. Montgomery,

to the information from CIGNA, Fuji's disability insurance carrier, regarding its interpretation of the videotape. Based on this information, Dr. Montgomery advised CIGNA that he would rescind the sitting restriction noted in his August 4, 1998 progress note regarding Petitioner. (2 R 513:24-514:18; 2 R 519-521; 2 R 330-331) When asked whether Petitioner could return to work, Dr. Montgomery could not provide CIGNA with any reason why Petitioner could not. (2 R 514:14-18; 2 R 519-521; 2 R 330-331) Petitioner testified that he had no reason to believe that what Dr. Montgomery told CIGNA was false. (1 R 212:16-214:4)

Petitioner's suggestion that Levine changed his description of Petitioner's job duties is much ado about nothing. Levine told CIGNA that Petitioner's job responsibilities involved a combination of sitting and walking up to five (5) to six (6) hours per day. (2 R 330-331) Levine also told CIGNA that Petitioner's occupation had "the freedom to change position as needed" and, at times, could "involve more sitting than standing and walking." (*Id.*) CIGNA did not ask Levine whether Petitioner's application for long-term disability benefits should be granted or denied, and Levine did not offer an opinion. (3 R 525, ¶17; 3 R 525-526, ¶18) Levine did not know whether the information he provided would support or hurt Petitioner's claim for long-term disability benefits. (3 R 525-526, ¶18) Significantly, Fuji does not have the authority to tell, advise, or ask CIGNA to grant or deny claims. (3 R 526, ¶20)

While Petitioner contends that he was not aware that CIGNA had contacted Dr. Montgomery, the record clearly reflects that Petitioner received from CIGNA a letter sent on September 3, 1998, in which CIGNA advised Petitioner that CIGNA had denied his application for long-term

disability benefits. (1 R 197:4-6; 2 R 330-331) In its letter, CIGNA told Petitioner the results of its videotaped surveillance of his activities and the information it had obtained from Dr. Montgomery, including the fact that Dr. Montgomery had not been able to provide any reason why Petitioner could not return to work. (2 R 330-331) On or about September 4, 1998, Petitioner contacted Levine at Fuji to discuss the letter he had received from CIGNA regarding the denial of his application for long-term disability benefits. (1 R 206:3-208:1) During the phone call, Petitioner discussed with Levine the reasons for CIGNA's determination as set forth in its September 3, 1998 letter, including the fact that Petitioner had been videotaped standing and walking with no noticeable defect and that Dr. Montgomery had removed his sitting restriction and had not been able to give CIGNA any reason why Petitioner could not return to work. (2 R 330-331; 3 R 523, ¶8)

While Petitioner contends Oatman's return date was "unilaterally and without justification" advanced, there was very good justification for the request that Oatman return to work on October 5, 1998. Specifically, the new information regarding Petitioner's condition caused Levine to question the legitimacy and appropriateness of Petitioner's desire for continued FMLA leave. (3 R 524, ¶9) Levine then commenced a series of communications with Petitioner to determine the status of Petitioner's condition and to determine when Petitioner intended to return to work, including:

- September 4, 1998: Levine sent Petitioner a letter advising Petitioner that he needed to know the status of Petitioner's condition. (3 R 524, ¶9; 2 R 335-336) Levine asked Petitioner

to contact him by September 8, 1998, and advised Petitioner that failure to contact Levine could result in disciplinary action up to and including termination. (3 R 524, ¶9; 2 R 335-336)

- September 11, 1998: Levine sent Petitioner another letter advising Petitioner that business needs dictated that Petitioner must return to work by October 5, 1998. (3 R 524, ¶9; 2 R 337) Levine advised Petitioner that if he were unable to return to work by October 5, 1998, his position would be filled. (*Id.*) Levine asked Petitioner to let him know if he could return to work any sooner than October 5, 1998, but did not require that Petitioner return before October 5. (*Id.*)

- September 24, 1998: Levine sent Petitioner a letter advising that Petitioner needed to contact Levine immediately to discuss his return to work status. (3 R 524, ¶9; 2 R 338) Levine again advised Petitioner that failure to contact Levine could result in disciplinary action up to and including termination. (*Id.*)

- Mid-September 1998: Levine called Petitioner to ask him to provide information from his doctor justifying Petitioner's supposed need to continue his leave. (3 R 524, ¶9; 1 R 162:22-163:24) Petitioner understood the telephone call and letters from Levine to be requests for documentation from his doctor regarding the seriousness of his health condition and the continued need to be on leave. (1 R 162:22-165:14; 1 R 190:6-191:8)

Ultimately, Petitioner sent Levine three medical records from Dr. Montgomery regarding his medical

condition: (1) a progress note from his July 21, 1998 appointment; (2) a physical ability assessment completed by Dr. Montgomery at or prior to Petitioner's August 4, 1998 appointment with Dr. Montgomery; and (3) a progress note from Petitioner's August 4, 1998 appointment with Dr. Montgomery. (1 R 177:13-178:19; 1 R 181:12-182:3; 2 R 324-328; 3 R 524, ¶10) Each of these records pre-dated the videotaped surveillance of Petitioner, Dr. Montgomery's conversation with CIGNA in which he revoked earlier limitations on Petitioner's ability to work, and the denial of long-term disability benefits to Petitioner by CIGNA. (2 R 324-328; 2 R 513:18-515:8; 2 R 519-521; 3 R 524, ¶10) More importantly, none of the documents established that Petitioner was using his FMLA leave for its intended purpose, as the documents failed to establish that Petitioner could not return to work. (2 R 324-328; 3 R 524, ¶10)

Petitioner failed to return to work on October 5, 1998. (3 R 524, ¶11) As a result, Petitioner's employment was terminated due to his failure to return to work from an unauthorized leave and his failure to provide current, legitimate written documentation regarding his continued absence. (1 R 193:3-10; 2 R 329; 3 R 524, ¶¶10-11) At the time of his termination, Petitioner had been on a leave of absence since March 31, 1998 – a total of 188 days, or more than six months. (1 R 185:6-24; 3 R 523, ¶5) Throughout the entire 188 days, Fuji kept Petitioner's position open for his anticipated return. (3 R 523, ¶7)

Petitioner testified that as of October 9, 1998, the date his FMLA leave was originally scheduled to expire, he still was unable to perform the essential functions of his former position at Fuji. (1 R 235:2-4; 2 R 265:9-14) Petitioner also testified that he had not looked for any employment since

March 31, 1998, because he believed that he could not hold down any job as a result of his knee pain. (1 R 86:17-87:1) Indeed, Petitioner did not believe he would ever be able to perform a job again. (2 R 257:7-14) Petitioner's physician never released Petitioner to work five to six hours standing per day. (2 R 510:6-13)

## REASONS FOR DENYING THE WRIT

Midway through this case, Petitioner realized that he wished he had filed a claim under the Americans With Disabilities Act ("ADA"). Having already given sworn deposition testimony negating an ADA claim, however, Petitioner also wished he could change that testimony. Petitioner now asks this Court to reverse the fact findings of the district court, as affirmed by the Fifth Circuit, which were based on Petitioner's own sworn deposition testimony. Petitioner also asks this Court to pervert the judicial process by holding that the filing of a lawsuit under one statute permits a plaintiff to later bring an alternate, unpleaded cause of action under another statute when the plaintiff loses on the first statute. Because the "errors" Petitioner asserts amount to nothing more than his disagreement with the lower courts' factual findings and application of the law, the Petition should be denied.

### 1. The Facts Set Forth in Petitioner's "Questions Presented" Are Not the Facts in This Case.

As a fundamental matter, each of the questions set forth at page i. of the Petition presuppose a factual situation in which Petitioner could have returned to work with a reasonable accommodation. However, both the district

court and the Court of Appeals found that Petitioner could not have returned to work – with or without a reasonable accommodation. In fact, the Court of Appeals specifically found as follows:

> Oatman does not deny that he was unable to perform the essential functions of his job as of the day he asserts his FMLA leave would have expired. In fact, he testified under oath that this was the case. Furthermore, Oatman testified that he did not believe there was any other job at Fuji he could he [sic] have performed, that he had not even looked for a job because of his condition, and that he did not think he would be able to perform any job between the date of his deposition and the age of 65 as a result of the problems with his knee.

(*See Oatman v. Fuji Photo Film USA, Inc.*, No. 02-10346 (5th Cir. 2002), Petition App. at 9; *see also Oatman v. Fuji Photo Film USA, Inc.*, No. 3:00-CV-2116-R (N.D. Tex. 2002), Petition App. at 15-16) Petitioner's ongoing attempt to disavow his sworn deposition testimony (without any explanation for the contradiction) before this Court is an improvident use of the writ, and the Petition should thus be denied.

Notably missing from Petitioner's claim is any evidence that he actually requested a reasonable accommodation that would have permitted him to return to work in October 1998. In Petitioner's mind, as evidenced by his deposition testimony, there was no reasonable accommodation that could have permitted him to return to work. In any event, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." 29 C.F.R. app. § 1630.9 (1992). Because Petitioner

did not request any accommodation, the questions he presents in his Petition are simply inapplicable to his case. Accordingly, the Petition should be denied.

**2. Petitioner Does Not Demonstrate a Legitimate Split Among Circuit Court Opinions on Any Material Issue in This Case.**

**a. Petitioner Does Not Identify Any Circuit Conflict Concerning Issues Related to His FMLA Claim.**

Notably, Petitioner does not even suggest that the Fifth Circuit's opinion in this case conflicted with other circuits or with any law or regulation. In fact, Petitioner concedes the Fifth Circuit's opinion was consistent with existing case law in other circuits, noting that the Fifth Circuit "reinforced a budding line of federal circuit case law. . . . " Petition, p. 12. Petitioner instead asks this Court to overrule the entire line of cases because they stand for the proposition that "compliance with the reasonable accommodation provision of the ADA is not required when an employee receives FMLA leave." Petition, p. 12. This is a clear misinterpretation of these cases, as none of them makes such a statement. To the contrary, the Fifth Circuit in the present case specifically noted that there may be times when the protections of the ADA are invoked in connection with FMLA leave, a situation which might occur when a plaintiff requests a reasonable accommodation. However, as discussed above, the Fifth Circuit correctly determined that this was not such a case.

The federal regulations clearly state, "If an employee is unable to perform an essential function of the position because of a medical or mental condition, including the

continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA." 29 C.F.R. § 825.214(b). Petitioner offers no authority whatsoever to contradict the conclusion that the FMLA does not incorporate an accommodation provision. Instead, Petitioner points to the ADA's provisions regarding reasonable accommodation and asserts that his FMLA claim should be considered "in conjunction with the ADA." (Petition, p. 13) Petitioner misinterprets the references within the FMLA regulations to employers' independent responsibilities under the ADA (and other discrimination statutes) as permitting him to morph or clone his FMLA claim into a claim under a different statute. (Petition p. 14-16) Not surprisingly, Petitioner fails to cite any authority for this position as there simply is none. Had Petitioner pursued a claim under the ADA, the feasibility of a reasonable accommodation *might* have been a relevant issue in this case (although Petitioner's own assertion that no reasonable accommodation existed would have barred his claim). Because Petitioner did not bring such a claim, however, the question of a reasonable accommodation did not arise. As the various Circuit Courts are consistent and correct in their interpretation of this issue, the writ should be denied.

**b. Petitioner's Attempt To Manufacture a Split Among Circuit Courts With Regard to the Elements of a *Prima Facie* Case of ERISA Discrimination is Without Merit.**

In finding that Petitioner failed to establish a *prima facie* case of discrimination under § 510 of ERISA (29 U.S.C. § 1140), the Fifth Circuit held that qualification for a position was an essential element of a *prima facie* case.

*See Oatman*, No. 02-10346, Petition App. 8-10, *citing Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254 (5th Cir. 2001). In so holding, the Fifth Circuit joined the First, Second, Third, Fourth, Seventh, and Eleventh Circuits in requiring evidence of qualification for a position as part of the *prima facie* case of an ERISA discrimination claim. To justify review of this widely-accepted legal precedent, Petitioner resorts to the desperate maneuver of manufacturing a split among circuits, advising the Court that the holdings of the Sixth and Eighth Circuits "do not separate 'otherwise' from 'qualified' when defining a *prima facie* case of an ERISA violation." Petition, p. 21-22, *citing Walsh v. UPS*, 201 F.3d 718 (6th Cir. 2000) and *Kinkead v. Southwestern Bell Telephone*, 49 F.3d 454 (8th Cir. 1995). Neither of these cases, however, discusses the concept of "otherwise qualified" or "qualified." Moreover, Petitioner fails to cite this Court to any discussion of how this distinction would affect this line of cases or justify review.

In *Walsh*, for example, the Sixth Circuit noted that a plaintiff can state a *prima facie* case by showing the existence of: (1) prohibited employer conduct; (2) taken for the purpose of interfering; (3) with the attainment of any right to which the employee may become entitled. *Id.* at 728. The Sixth Circuit was not asked to address the question of whether a plaintiff must be qualified (or indeed, "otherwise qualified") to establish a *prima facie* case of ERISA discrimination. Indeed, a plaintiff's lack of qualification for a position would certainly dispel any assertion that the plaintiff was removed from the position for the purpose of interfering with the attainment of ERISA benefits, and would therefore destroy any attempt at a *prima facie* case.

In *Kinkead*, the Eighth Circuit offered an even more generic outline of a *prima facie* case of ERISA discrimination, finding that "a claimant must demonstrate a causal connection between the likelihood of future benefits and an adverse employment action." *Id.* at 457. In *Kinkead*, the court found that the plaintiff failed to present a *prima facie* case of retaliation because she presented no evidence that her termination was motivated by a desire to prevent her application for additional disability benefits. *Id.* Indeed, the evidence clearly established that the plaintiff was terminated for poor attendance and poor job performance – explanations which could reasonably be construed as establishing the plaintiff was not qualified for the position. Thus, neither *Walsh* nor *Kinkead* is in conflict with circuits that have held that qualification for a position is an element of a *prima facie* case of ERISA discrimination.

Petitioner also suggests that the *Oatman* and *Holtzclaw* cases are in conflict with the Eleventh Circuit's admonition in *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217 (11th Cir. 1993). In noting that the elements of a *prima facie* case may vary according to the type of discrimination alleged, the *Clark* court cited *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497, 1550 (11th Cir. 1991). In *Alphin*, the court concluded that the plaintiff could establish a *prima facie* case of age discrimination by showing that (1) he was in a protected age group and was adversely affected by an employment decision; (2) that he was qualified for his current position or to assume another position at the time of discharge or demotion; and (3) evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age in reaching the decision at issue. Thus, in *Alphin*, the court held that

although qualification and membership in a protected category were essential elements, the final element – evidence of intent to discriminate – could be established in a number of alternate ways depending on the facts and circumstances of the particular case. Petitioner's attempt to imply that the 11th Circuit somehow suggested that qualification was not essential is simply without merit.

### 3. The Petition Should Not be Granted Because Petitioner Has Otherwise Failed to Demonstrate Any Factual Basis for His Claims.

#### a. This Court's Decision in *Ragsdale v. Wolverine World Wide, Inc.* Bars Petitioner's FMLA Claim.

Even assuming the question of a reasonable accommodation were relevant to Petitioner's FMLA claim, Petitioner still cannot prevail. Under the FMLA, an employee is entitled to only twelve (12) weeks of FMLA leave, during which the employee's position must be held open for his return. 29 U.S.C.A. § 2612 (West 2002). Prior to his termination, Petitioner enjoyed one-hundred eighty-eight (188) days of leave (nearly 27 weeks) during which his position was held open for his return. (1 R 155:2-14; 1 R 185:6-24; 1 R 223:15-24; 3 R 523-524, ¶¶ 5, 7, 11) In *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (U.S. 2002), this Court rejected a plaintiff's assertion that her termination after thirty weeks of continuous leave was in violation of the FMLA because her employer had never notified her in writing that such leave would count against her FMLA entitlement. This Court found that to prevail on this claim, the plaintiff must show an impairment of rights or resulting prejudice as a result of the lack of notice. *Id.* at 1162. Here, there is no evidence that Petitioner suffered

any impairment of his rights or resulting prejudice as a result of Fuji's notice that it was designating his leave as FMLA leave several months after his leave started. To the contrary, the evidence clearly established that Petitioner would not have returned to work had he been notified that his FMLA leave would expire on June 23, 1998 (twelve weeks from the commencement of his leave). Indeed, Petitioner still believed he was unable to perform any work at the time of his deposition on May 15, 2001. (1 R 86:17-87:1)

**b. Petitioner Failed to Establish a *Prima Facie* Case of Discrimination Under § 510 Because He Did Not Demonstrate That Fuji Acted With Specific Intent to Interfere With ERISA Rights.**

Petitioner's claim for long-term disability benefits was denied over a month before he was terminated. Thus, Fuji's termination of Petitioner could not have interfered with Petitioner's right to these benefits. (Notably, Petitioner did not invoke his right to appeal CIGNA's denial of long-term disability benefits despite being advised how to initiate such an appeal. (Pl. Dep. 129:17-20; 228:19-229:20)) In an argument completely unrelated to any case law, and underscoring the frivolous nature of this Petition, Petitioner asserts that "but for Fuji's interference with Oatman's LTD application, Oatman would have qualified for LTD benefits." Petition at 22-23. Petitioner's argument, however, is based on his continued misunderstanding of the individual decisions and actions involved. CIGNA, not Fuji, denied Petitioner's application for long-term disability benefits after determining, based on its own independent surveillance, that Petitioner was not eligible for long-term

disability payments. (2 R 330-31) Despite Petitioner's continued confusion on this point, there is no evidence that Fuji was a decisionmaker with regard to the determination or acted with intent to interfere with Petitioner's application for LTD benefits. (3 R 525-26, ¶ 17, 18, and 20)

Fuji was, however, the decisionmaker with regard to Petitioner's termination, and the decision had nothing to do with the merits of Petitioner's claim to CIGNA for long-term disability benefits. Upon learning that Petitioner's claim for long-term disability benefits had been denied by CIGNA and learning of other information that cast doubt on the validity of Petitioner's continued need for FMLA leave, Fuji asked Petitioner to do one of two things: either provide Fuji with information establishing his continued need for FMLA leave or return to work. (1 R 162:22-165:14; 2 R 335-38; 3 R 524, ¶¶ 9, 11) Petitioner failed to do either of these things, and was thus terminated for failing to return from an unauthorized leave. (3 R 524, ¶¶ 10-11)

Despite Petitioner's attempt to portray these independent decisions as inconsistent and nefarious, the evidence clearly establishes that the decisions are consistent with the information received (or not received) by each decisionmaking entity. Because Petitioner failed to present evidence that Fuji acted with the intent to interfere with his ERISA rights, Petitioner could not prevail on his ERISA claim; accordingly, the writ should be denied.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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